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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

LOCAL NO. 149, INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-AFL-CIO), WINCHESTER, VIRGINIA, *Petitioner*,

v.

AMERICAN BRAKE SHOE COMPANY, AMERICAN BRAKEBLOK DIVISION, WINCHESTER, VIRGINIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement:	
I. The Facts	3
II. The Decision of the District Court	5
III. The Decision of the Court of Appeals	5
Reasons Relied Upon for the Issuance of the Writ:	
I. *The Court of Appeals in holding that an award of attorney fees, or costs as between solicitor and client, to the successful plaintiff was not mandatory and unconditional in an action for the specific performance of an arbitrator's award under Sec. 301 of the Act was in conflict with the decisions of this court and the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare and the court has decided an important question of federal law which has not been, but should be, settled by this court. Such decision calls for this court's power of supervision in that the appellate court has departed from the mandates of this court to the effect that the court "must fashion" from the policy of our national labor laws substantive law which shall encourage the parties to comply with the arbitrator's award, discourage needless litigation disruptive to industrial peace and assure that in industrial disputes the arbitrator's award shall be the end to litigation rather than its commencement*	

Page

II. *The lower court in substituting its judgment for that of the District Court and in making independent findings of fact rendered a decision in conflict with the principles applied and accepted by court of appeals and this court and has decided an important question of federal law which has not been, but should be, settled by this court. Such decision calls for this court's power of supervision* 18

Conclusion 19

Appendix A 23

Appendix B 31

Appendix C 33

Table of Cases Cited

Clarke Hybrid Corn Co. v. Stratton Grain Co., 214 F. 2d 7 (C.A. 8) 18

Fletcher v. Colorado & Wyoming Railway Co., 347 P.2d 156 (S.Ct. Colo.) 8

Ford Motor Company v. Huffman, 345 U.S. 330 7

Glover v. Brotherhood of Railway & Steamship Clerks, 250 N.C. 35, 108 S.E. 78, 44 LRRM 2098 8

Gotham Silk Hosiery Co. v. Artcraft Silk Hosiery Mills, 147 F.2d 209 (C.A. 3) 19

Irish v. United States, 225 F.2d 3 (C.A. 9) 18

J. P. (Bum) Gibbins v. Utah Home Fire Ins. Co., 202 F.2d 469 (C.A. 10) 18

Local 174, Teamsters, etc. v. Lucas Flour Company, U.S. , 49 LRRM 2717 7

McCaughn, Collector of Internal Revenue v. Real Estate Land Title & Trust Co., 297 U.S. 606 18

2 Michie's Jurisprudence of Virginia, 54 17

NLRB v. Hearst Publications, 322 U.S. 111 15

Panaview Door & Window Co. v. Reynolds Metal Co., 255 F.2d 920 (C.A. 9) 18

Randall Foundation, Inc. v. Riddell, 244 F.2d 803 (C.A. 9) 18

Page

Smallfield v. *Home Insurance Company of N.Y.*, 244 F.2d 337 (C.A. 9) 18

Steele v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 65 S.Ct. 226 8

Textile Workers of America v. *Lincoln Mills of Alabama*, 353 U.S. 448, 77 S.Ct. 912 7, 9, 10, 11, 12, 13

United Steelworkers of America v. *American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343 19, 20

United Steelworkers of America v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 19

United Steelworkers of America v. *Warrior and Gulf Navigation Company*, 363 U.S. 574, 80 S. Ct. 1347 7, 20

Wright v. *Carrigg*, 275 F.2d 448 (C.A. 4) 11

Zurich Insurance Company v. *Sigourney*, 278 F.2d 826 (C.A. 9) 14

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v.

AMERICAN BRAKE SHOE COMPANY, AMERICAN BRAKEBLOK DIVISION, WINCHESTER, VIRGINIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The Petitioner, Local No. 149, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America (UAW-AFL-CIO), prays that a writ of certiorari issue to review the decision and decree of the United States Court of Appeals for the Fourth Circuit entered on the 5th day of January, 1962, denying the Petitioner's application for an award of reasonable attorney fees for Petitioner's counsel in these proceedings.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pages 23 to 30) is recorded at F.2d , , 49 LRRM 480.

JURISDICTION

The opinion of the court below was filed on January 5, 1962 and its decree was entered on January 5, 1962. The jurisdiction of this court is invoked under 28 U.S.C. 1254 and Sec. 301 of the Labor Management Relations Act of 1947, as amended, hereinafter sometimes referred to as the "Act," 29 U.S.C. 185.

QUESTIONS PRESENTED

1. The first question presented is: In an action for the specific enforcement of an arbitrator's award planted on Sec. 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. 185, is an award of costs as between solicitor and client to the successful plaintiff mandatory and unconditional?

2. Assuming *arguendo* that the first question is answered in the negative, the second question presented is: In an action for the specific enforcement of an arbitrator's award planted on Sec. 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. 185, is an unsuccessful defendant who had "no sound reasons for not complying voluntarily with the arbitrator's award" exonerated from the payment of the successful plaintiff's costs as between solicitor and client on the sole ground that there was a "lingering doubt" as to whether Sec. 301 of the Labor Management Relations Act of 1947, as amended, conferred jurisdiction on the district courts to enforce an arbitrator's award?

3. The District Court found that the "defendant had no sound reasons for not complying voluntarily with the

arbitrator's award," but denied an award for costs as between solicitor and client because "it should not be within the power of the courts to penalize litigants because their defenses cannot be upheld." The appellate court denied an award for costs as between solicitor and client because "there was justification for the litigation" in view of the "lingering doubt that the Westinghouse decision should be limited to its peculiar factual situation." The third question presented is: Did the appellate court exceed its power in that it made findings of fact upon which it substituted its judgment for that of the District Court?

STATUTES INVOLVED

Pertinent provisions of the Labor-Management Relations Act of 1947, as amended, are as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. 185, Sec. 301(a)

STATEMENT

I. The Facts

The Petitioner, a labor organization, the plaintiff in the District Court filed a policy grievance on August 31, 1956, alleging violations of certain sections of a collective bargaining agreement, then in existence dated February 27, 1956. The grievance procedure outlined in the agreement was followed and when no settlement was reached, the grievance was submitted to arbitration in conformity with the arbitration procedures under the agreement. An arbi-

tration hearing was held and on February 18, 1957 the arbitrator, G. Allan Dash, Jr., rendered his opinion and award. The American Brake Shoe Company, American Brakeblok Division, hereinafter referred to as the "Employer," the defendant in the District Court refused to abide by that part of the award which was in favor of the Petitioner. On February 8, 1958, the Petitioner herein brought this action, praying for the specific enforcement of the arbitrator's award pursuant to Sec. 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. 185.

On March 5, 1958, the Employer answered, among other things, that "this court is without jurisdiction over the subject matter." After a trial on issues, on January 8, 1960 the District Judge, The Hon. John Paul, entered an order which, in part, read:

> "It is, therefore, ordered, adjudged and decreed that the award of Arbitrator G. Allan Dash, Jr., dated February 18, 1957, be and hereby is confirmed and the Defendant is hereby ordered to abide by and comply with the terms of said award and that specific performance of said award is hereby decreed."

The Employer appealed to the United States Court of Appeals for the Fourth Circuit. The court affirmed the District Court on January 6, 1961. Its decision is reported at 285 F. 2d 869.

Thereafter, the plaintiff filed an application for plaintiff's attorney fees. (Appendix C; *infra*, p. 33) The court denied such application, although in its memorandum (Appendix B; *infra*, pp. 31-32) it stated that "the defendant had no sound reasons for not complying voluntarily with the arbitrator's award." The Petitioner appealed to the United States Court of Appeals for the Fourth Circuit from the denial of its application for attorney fees. The Court of Appeals affirmed the lower court on January 5,

1962, and of this ruling the Petitioner seeks a writ of certiorari.

II. The Decision of the District Court

The trial court denied plaintiff's application for attorney fees and in essence held that a trial court is without power to award attorney fees in a suit arising under Sec. 301 of the Act. It stated, in part:

> "* * * *it should not be within the power of the courts to penalize litigants because their defenses cannot be upheld.* It would be a dangerous custom to adopt for a court to punish defendants by compelling them to pay the attorneys' fees of the opposing parties whenever the defenses offered were found to be without merit." (Italic ours)

III. The Decision of the Court of Appeals

The decision of the Court of Appeals establishes that the District Court did have power to award attorney fees in a case arising under Sec. 301 of the Act for the specific enforcement of an arbitrator's award. However, the court did not declare that an award of attorney fees to a successful plaintiff is mandatory and unconditional in an action for the specific enforcement of an arbitrator's award under Sec. 301 of the Act. The court declared the rule:

> "In an appropriate case attorneys' fees should be awarded against a party who, without justification, refuses to abide by the award of an arbitrator."

In applying its rule, however, the Court of Appeals excused the defendant from responding in attorney fees because "the lingering doubt concerning the Westinghouse case * * * was justification for the litigation herein involved."

The "lingering doubt" referred to the court's opinion upon the first appeal herein, wherein the court stated:

> "* * * there seems to be a lingering doubt that the Westinghouse decision should be limited to its peculiar factual situation. * * *"

REASONS RELIED UPON FOR THE ISSUANCE OF THE WRIT

I. *The Court of Appeals in holding that an award of attorney fees, or costs as between solicitor and client, to the successful plaintiff was not mandatory and unconditional in an action for the specific performance of an arbitrator's award under Sec. 301 of the Act was in conflict with the decisions of this court and the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare and the court has decided an important question of federal law which has not been, but should be, settled by this court. Such decision calls for this court's power of supervision in that the appellate court has departed from the mandates of this court to the effect that the court "must fashion" from the policy of our national labor laws substantive law which shall encourage the parties to comply with the arbitrator's award, discourage needless litigation disruptive to industrial peace and assure that in industrial disputes the arbitrator's award shall be the end to litigation rather than its commencement.*

First. While the appellate court recognized the question raised in the Petitioner's appeal, to wit:

> "The question remains as to how the traditional equitable power shall be used to effectuate the policy of the Act under the mandate of the Supreme Court."

our complaint is that the appellate court limited the exercise of such power to such a degree that the fullest measure of the effectuation of such policy is not accomplished. We contend that in order that "the policy of the Act" and our "national labor legislation" may be effectuated as mandated by this court, an award of attorney fees to a successful plaintiff in an action to enforce an arbitrator's award under Sec. 301 must be mandatory and unconditional. By fashioning such substantive rule, the "basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare" shall be advanced (*Local 174, Teamsters, etc.*, v. *Lucas Flour Company*, U.S. . , 49 LRRM 2717), and a practical implementation shall be applied to assist in the achievement of the proposition that "The refusal of courts to review the merits of an arbitration award *is* the proper approach to arbitration under collective bargaining agreements." (Italics ours) (*United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 363 U.S. 574, 80 S.Ct. 1347) As we shall see, a charge of attorney fees against the unsuccessful defendant will result in a deterrent against the utilization of the courts, or the threatened use of the courts, for the frustration of our national labor laws and the avoidance of compliance with a valid arbitrator's award.

The action to enforce an arbitrator's award is statutory in origin and must be compatible to the purposes and policies enunciated by Congress in the enactment of the Labor-Management Relations Act of 1947, the National Labor Relations Act, as amended, and our national labor laws. *Textile Workers of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 77 S.Ct. 912. By these statutes, Petitioner in the instant case has imposed upon it the duty to represent all employees without discrimination, whether they are members of its union or free riders. *Ford Motor*

Company v. *Huffman*, 345 U.S. 330, 337; *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 65 S.Ct. 226.

The Petitioner in this case, whose place of residence is the State of Virginia, a so-called "right to work" state, has imposed upon it thus the duty to process and arbitrate grievances and, if need be, to enforce arbitrators' awards for free riders who are exonerated from contributing to the cost for such services. The same situation would exist in those cases where an employer has not agreed to union security terms and the employee elects to become a free rider. In the instant case, had the Petitioner refused or failed to institute the action, it would have been subject to liability. *Glover* v. *Brotherhood of Railway & Steamship Clerks*, 250 N.C. 35, 108 S.E. 78, 44 LRRM 2098. Had the Petitioner failed or refused to process the grievance, it likewise may have been held liable. *Fletcher* v. *Colorado & Wyoming Railway Company*, 347 P. 2d 156 (S.Ct. Colo.) Thus it is apparent, by reason of the duty cast upon the Petitioner, that the Employer may taunt or pique it by purposely causing it needlessly to litigate for the benefit of free riders. While it may be argued that all employers will not seize upon this device to cause discord with a union and cause their employees to realize that they may secure the benefits of union representation without contributing to the costs, nevertheless, laws are enacted and rules are established not to control the good but to deter the wicked. The thousands of unfair labor practice cases stand as proof of the wickedness of many employers. Surely Congress in determining our national labor policy did not intend to foster this source of irritation. Moreover, it seems highly unlikely that Congress intended that employee representatives, in the assumption of their bargaining responsibilities, must be charged attorney fees for the successful enforcement of an arbitrator's award. It appears

to us to be just and fair that if free-riders may ride without expense through the entire length of the arbitral process, the unsuccessful employer should be charged for the free ride.

The instant case is peculiar to the field of labor-management relations, of which Congress has taken special cognizance. The cause of action herein was given in order to provide for the enforcement of collective bargaining agreements in line with the purposes of the Act to encourage the practices and procedures of collective bargaining to the end that a binding employment agreement shall be consummated and thereby stabilization of industrial relations and industrial peace shall be secured. *Textile Workers v. Lincoln Mills, supra.* Our national labor policy is dedicated to the promotion of collective bargaining which ends with the agreement not to strike and the agreement to arbitrate industrial disputes as the *quid pro quo* of the agreement not to strike; the specific enforcement of the agreement to arbitrate except in rare instances; and a minimal scope for review of an arbitrator's award rendered pursuant to the agreement to arbitrate. Our national labor policy contemplates that the terminal point of the agreement not to strike shall be neither the picket line nor the court, but the arbitrator. Our national labor policy is fashioned to discourage the repudiation of arbitrators' awards. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 1360. This court stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. * * *"

This policy is so fixed and resolute that this court has said "that industrial peace can best be obtained only in that

way." *Textile Workers* v. *Lincoln Mills, supra.* In the same case, this court said, p. 916:

> "Congress was also interested in promoting collective bargaining *that ended with the agreement not to strike.* * * *" (Italics ours)

It is apparent that there would be little promotion for the execution of agreements not to strike if the parties were relieved of the obligation of complying with the resolution of their differences through arbitration *or if the costs of obtaining the fruits of arbitration exceeded the benefits to be derived.* Under such circumstances, no-strike agreements would be pointless. Indeed, if the lower court's decision is sustained, the Petitioner in the future, as it was caused to do in the instant case, will be faced with one of three choices: (1) in the event the costs of litigation exceed the amount of the grievance claimed, Petitioner may choose to reimburse the grievant rather than expend more than the amount of the claim in costs of litigation; (2) the Petitioner may choose to abandon the award and thus expose itself to an action for failure or refusal to enforce the award; or (3) the Petitioner may, as it did in the instant case, choose to file suit, with the full costs of litigation charged against it, even to the very portals of the Supreme Court. In this context, neither natural justice nor the policy of our national labor laws condones or suggests that the enjoyment of rights accruing under the Act shall be conditioned upon monetary considerations as to whether a union may best fulfill its stewardship to the employees it represents by abandoning a favorable arbitrator's award, either because it does not have the financial means for litigation or because the costs of litigation exceed the benefits to be derived. Congress, wisely observant of the costs of litigation, in the National Labor Relations Act, as amended, 29 U.S.C. 154, et seq., has taken

from the shoulders of the party wronged the burden of financing litigation against the wrongdoer. That is to say that the scheme of the National Labor Relations Act, as amended, embodies the concept that the wrong therein to be corrected shall not be at the expense of the wronged. Under such Act, Congress has provided counsel and investigatory procedures so that employees who are wronged by an employer's misconduct or, indeed, where employers are wronged by a union's misconduct, shall not have the right imperiled by their financial inability. The same principle is embodied in the Fair Labor Standards Act of 1938, 29 U.S.C. 216 (c).[1]

This court has said that we must look to the policy of the Act and fashion "a remedy that will effectuate that policy." This court further teaches that the range of judicial inventiveness will be determined "by the nature of the problem." *Textile Workers v. Lincoln Mills, supra.* What, therefore, is "the nature of (our) problem?" The nature of our problem is: How can we fashion substantive law which will best promote the policy of the Act? Our national labor policy dictates that representatives of employees shall be encouraged to voluntarily surrender the right to strike in exchange for the agreement to arbitrate. In pursuance of such policy, we seek a rule which will provide that an award for attorney fees to a successful plaintiff in an action for the specific enforcement of an arbitrator's award under Sec. 301 of the Act will be mandatory and unconditional. Such rule will add an ingredient to the arbitral process which will provide a strong incentive or coercive influence for the promotion of such policy. Indeed, if Congress were interested in promoting agreements not to

[1] In *Wright v. Carson*, 277 F. 2d 418 (C.A. 4), in referring to 29 U.S.C. 216(b), the court said: "With respect to the counsel fee, the court had no discretion to deny it; the law's requirement of an award is mandatory and unconditional.

strike—and it is—such promotion would have fallen flat if it had not provided the means for enforcing such agreements. This it did in Sec. 301. *Textile Workers v. Lincoln Mills, supra.* However, if the "remedy fashioned" is limited to the extent that it is repugnant to the promotion of such agreements, then the federal policy is frustrated. We maintain that unless an award of attorney fees to the successful plaintiff in an action for the specific enforcement of an arbitrator's award is unconditional and mandatory, the federal policy is frustrated and the arbitral process as an instrument for industrial peace stands imperiled because: (1) a party may be encouraged to repudiate the no-strike provisions of its collective bargaining agreement and resort to strike rather than incur costs resulting from the litigation for the enforcement of a valid arbitrator's award; (2) the employer may deliberately refuse to abide by a valid arbitrator's award for the purpose of weakening a union through the dissipation of the union's funds for the costs of litigation; (3) the costs of attorney fees when measured against the benefits to be derived therefrom may cause the abandonment of a valid arbitrator's award; (4) a union may consider that it is cheaper and more effective to retain the right to strike rather than to submit controversies to arbitration with the eventuality of protracted litigation at its expense; (5) the incentive to execute no-strike agreements shall be imperiled if the employer has a standing invitation to litigate valid arbitration awards at the union's expense; (6) a party at its whim or caprice may foist the payment of costs of litigation on the prevailing party, including attorney fees, before it shall be required to accept a valid arbitrator's award; (7) an employer may utilize its refusal to comply with a valid arbitrator's award as a subtle means to undermine a union, minimize its bargaining effectiveness, and destroy its prestige; and (8) an

employer may force a union to needlessly expend its funds for the purpose of litigating valid arbitration awards for free riders.

On the other hand, if the award of attorney fees is mandatory and unconditional, it shall advance national labor policy in that (1) an award of attorney fees to the successful plaintiff shall act as a practical stimulant for a prompt acceptance of a valid arbitrator's award; (2) the award of attorney fees shall discourage needless litigation; and (3) the award of attorney fees shall encourage the parties to make the arbitrator's award the terminal point of the arbitral process rather than the courts.

Second. In *Textile Workers of America* v. *Lincoln Mills*, *supra*, the court said:

> "We conclude that substantive law to apply in suits under 301(a) is federal law which the courts must fashion from the policy of our national labor laws."

We have seen that the mandatory and unconditional award of attorney fees for successful plaintiffs in an action to enforce an arbitrator's award finds support in the teachings of this court and the salutary purposes of the Labor-Management Relations Act. If we look to our other national labor laws, the same conclusion obtains, for under almost every national labor law the wronged employee or party is saved harmless from the costs of litigation, including attorney fees. As we have noted above, in cases arising under the National Labor Relations Act, the government bears the entire burden of the costs of litigation on behalf of the wronged party, whether it be employer, employee or a union. It is clear, therefore, that Congress means that its statutory objectives shall be obtained without prejudice to the wronged party. The reason for this is

obvious, for if the wronged party were required to finance litigation in the courts, many cases would fail for the lack of the wronged party's financial means to bear the costs. The same principe has caused Congress to provide that the government shall bear the expenses of litigating back wages from employers under the Walsh-Healey Act, 41 U.S.C. 35, 36. In enacting its labor laws, Congress was intent on removing any financial impediments which might stand in the way of the achievement of its policies. In the Fair Labor Standards Act of 1938, 29 U.S.C. 216, a wise Congress was careful to include, as additional costs, attorney fees for the wronged employee, or, as in the cases under the National Labor Relations Act and the Walsh-Healey Act, the administrator upon request may prosecute the action for the employee under 29 U.S.C. 216(c) and the government bears the entire expense. Under the Welfare and Pension Plan Disclosure Act, 29 U.S.C. 302, Congress again has avoided the financial impediment against an employee's availing himself of his right to examine a description of the plan or a copy of the trustees' annual report, by providing attorney fees for the enforcement of such right. In the Landrum-Griffin Act, 29 U.S.C. 153, et seq., Congress provided for attorney fees in Title 3, Sec. 304. In Sec. 102 Congress afforded relief to the party wronged which is so broad in scope that the court is authorized to enter an order "for such relief as may be appropriate." Many of our states provide attorney fees for employees in Workmen's Compensation cases. Cf. *Zurich Insurance Company* v. *Sigourney*, 278 F. 2d 826 (C.A. 9) The thrust of all our federal laws is that the wronged party shall be vindicated without a charge against him for costs of litigation, including costs as between solicitor and client. If such rule were not written in our federal policy, it is apparent that the rights which provide

for the implementation of such policy would be full of sound and fury but signify nothing.

While it may be argued that large international unions may be able to bear the financial stress of protracted litigation in connection with the enforcement of arbitration awards, our national labor laws are not passed to protect the strong but to protect the weak, nor is it intended by such laws that the dues payers' money shall be exposed to such hazards. Our national labor policy seeks an industrial world wherein the strong are just, the weak are secure and industrial peace prevails. Where the strong have not recognized the obligations cast upon them, then the law must step in and protect the weak. It is axiomatic that the small, weak unions need so badly the aid of this court in cases such as the instant case. Since many unions lack the financial or numerical strength to engage an employer in strike over every grievance, their only recourse for the resolution of their disputes with the employer during the period of a collective bargaining agreement is through the arbitral process. If they are denied the effective use of this medium, the pendulum will have swung in favor of the employer and the balancing of bargaining power between the employer and his employees which is envisioned in the National Labor Relations Act shall have been for nought.[2] Nor shall the intent of Congress find manifestation for the promotion of the policies and procedures of collective bargaining to the end that agreements not to strike shall be consummated and economic warfare eliminated. On the other hand, if substantive law is provided by this court whereby successful parties shall be awarded

[2] In *NLRB* v. *Hearst Publications*, 322 U.S. 111, 126, this court said: "Hence the avowed and inter-related purposes of the Act are to encourage collective bargaining and to remedy the individuals' and workers' inequality of bargaining power . . . ."

attorney fees as a matter of right in suits for the enforcement of arbitration awards, a full measure of justice shall be accomplished and the courts shall not be used for the purpose of setting roadblocks in the way of the achievement of the intent of Congress. We urge that this court fashion a remedy which shall fit the needs of the problem which is before this court and with which each and every union in this nation must at some time or other be confronted.

Third. The court's opinion reveals that, unlike the trial court, the Court of Appeals held that an attorney's fee may be awarded in cases for the specific enforcement of an arbitratof's award under Sec. 301 of the Act. This principle is well taken, but it is clear from our foregoing discussion that unless the award of attorney fees is mandatory and unconditional, our national labor policy falls short of the implementation which the mandates of this court, and the statutes envisage. Moreover, if the Court of Appeals' principle of law were accepted, its application of such principle to the facts in the instant case was arbitrary and its judgment does not conform with the mandates of this court nor the statutes.

The Court of Appeals excused the Employer from paying the plaintiff's attorney fees because the Employer had raised the question of jurisdiction in respect to Sec. 301 of the Act, of which there was some "lingering doubt." We submit that the Court of Appeals was not only in error when it did not hold that the award of attorney fees for the plaintiff was mandatory and unconditional, but it was also in error in applying its own criterium in that the alleged "lingering doubt" found by it did not justify excusing the Employer from the payment of the plaintiff's attorney fees. If such is the way in which the principle is to be applied, it is difficult to conceive of any situation in which a plaintiff would be entitled to an attorney's fee, for it

would be a virtual impossibility for a plaintiff to prove that the defendant or its lawyer did not believe in the employer's defenses. It is further clear that the plea of lack of jurisdiction is no defense to the merits of the award, since the trial court found that the defendant "had no sound reasons for not complying voluntarily" with the award. Moreover, had the action been dismissed in the trial court for lack of jurisdiction, the plaintiff would have had a cause of action under the law of Virginia for the specific enforcement of the arbitrator's award. (See, 2 *Michie's Jurisprudence of Virginia*, Sec. 41, p. 51). The price for attorney fees should be levied upon the defendant, whether or not there existed a "lingering doubt," because the defendant caused the plaintiff to expend money for the enforcement of a valid arbitrator's award with which the defendant refused to comply without reason. The Employer's needless and arbitrary resistance to the award is the gist of its bad faith and the frustration of our national labor policy. Moreover, by the time the case came on for decision in the Court of Appeals, the so-called "lingering doubt" had been completely dissipated. Thus, when the court rendered its decision, the Employer had no grounds for its continued refusal to voluntarily comply with the arbitrator's award.

Our foregoing discussion demonstrates that the substantive law fashioned and applied by the Court of Appeals in the instant case does not satisfy the mandates of this court that such law shall further the policy of our national labor laws.

II. *The lower court in substituting its judgment for that of the District Court and in making independent findings of fact rendered a decision in conflict with the principles applied and accepted by courts of appeals and this court and has decided an important question of federal law which has not been, but should be, settled by this court. Such decision calls for this court's power of supervision.*

The Court of Appeals declared the law to require that: "In an appropriate case attorneys' fees should be awarded against a party who, without justification, refuses to abide by the award of an arbitrator." However, after the Court of Appeals had declared the law, it usurped the lower court's function and made findings of fact upon which it determined its judgment. In making these findings of fact, it exceeded its power. Under applicable law, the case should have been remanded to the trial court because the Court of Appeals had no power to substitute its judgment for that of the trial court or to make findings of fact. In *McCanahan, Collector of Internal Revenue* v. *Real Estate Land Title & Trust Co.*, 297 U.S. 606, 608, this court said:

> "The Circuit Court of Appeals was without authority to weigh the evidence and to make its own findings."

In the case of *Irish* v. *United States*, 225 F.2d 3, 8 (C.A. 9), the court said:

> "This court is not the trier of facts, nor does it substitute its own judgment for that of the trial court."

Accord, J. P. (Bum) Gibbins v. *Utah Home Fire Ins. Co.*, 292 F.2d 469 (C.A. 10); *Clarke Hybrid Corn Co.* v. *Stratton Grain Co.*, 214 F.2d 7 (C.A. 8); *Panaview Door & Window Co.* v. *Reynolds Metal Co.*, 255 F.2d 920 (C.A. 9); *Randall Foundations* v. *Riddell*, 244 F.2d 803, 805 (C.A. 9); *Smallfield* v. *Home Insurance Co. of N.Y.*, 244 F.2d 337, 341 (C.A.

9). In *Gotham Silk Hosiery Co. v. Interlaken Silk Hosiery Mills*, 147 F.2d 209, 222 (C.A. 3), the court held that the appellate court had no "power to find facts."

We submit the Court of Appeals should have remanded the case to the lower court to ascertain whether or not the defendant without justification refused to abide by the award of the arbitrator. The finding in this respect should concern not only the question of "lingering doubt," but also all the other facts which were a part of the evidence. When the Court of Appeals attached weight to the factual circumstances of "lingering doubt," it clearly exercised power which lies only in the trial court. It was for the trial court to weigh such facts together with other facts which might support or negate justification.

CONCLUSION

The court in its decision below accepted the fact that the District Court may award attorney fees to a successful plaintiff in an action for the specific enforcement of an arbitrator's award under Sec. 301 as a means of effectuating the policies of the Labor Management Relations Act, of 1947, as amended. However, in determining what the substantive law should be under Sec. 301, the court fell short of the greatest measure of attainment for such policy in that it did not declare the award of attorney fees for the successful plaintiff to be unconditional and mandatory. Thus it did not render less attractive contests over valid arbitrators' awards in district courts.

> "* * * That policy (29 U.S.C.A. 173(d)) can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given *full play*." (Italics ours)

United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S. Ct. 1343, 1346.

Under the Lower court's rule, a losing defendant to an arbitration proceeding is allowed, except in rare cases, at its whim or caprice to foist upon the successful plaintiff the costs of litigation and such defendant may reap the bargaining advantages therefrom without deterrent. Such rule is as unrealistic as it is unjust and runs counter to the realities of the industrial world. While this court has found that there may be "therapeutic value" in arbitrating frivolous claims and that "arbitration is a stabilizing influence," *United Steelworkers of America* v. *American Mfg. Co.*, *supra*, there can be no "therapeutic value" or "stabilizing influence" resulting from the contest of an arbitrator's award in the District Court, for instead of pacifying and resolving the industrial conflict, as does the arbitration hearing, such court action stirs up the parties, and solicits participation of professionals and others whose interests are not necessarily allied with the peaceful disposition of the conflict or who lack experience and competence to understand the problems involved.[a] Moreover, such court action continues to expose old wounds to new abrasives and causes financial irritation. Thus an incentive or even a coercive influence which tends toward the accomplishment of the end of industrial strife at the arbitral level is to be fostered and preserved. This the unconditional and mandatory award of attorney fees to the successful plaintiff does.

The policies of the Labor Management Relations Act and our other national labor laws are replete with the intent of Congress to save harmless the party wronged from the costs of litigation, including attorney fees. This court has stated that it is the intent of Congress to promote no

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[a] "* * * The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance [as an arbitrator] because he cannot be similarly informed * * *" *United Steelworkers* v. *Warrior and Gulf Navigation*, *supra*.

strike agreements and to give sanction to the quid pro quo of such agreements, the agreement to arbitrate. The futility of achieving such purpose is apparent unless the parties are encouraged to abide by the end product of the agreement to arbitrate, the arbitrator's award. Thus the Supreme Court has interpreted the intent of Congress to limit the scope of reviewability of arbitrator's awards. Just as the limitation placed on the scope of review of an arbitrator's award deters parties from resisting the award, so shall the mandatory and unconditional award of the successful plaintiff's attorney fees encourage parties to abide by a valid arbitrator's award rather than risk incurment of additional expenditures.

The mandatory and unconditional assessment of attorney fees will impose a financial burden upon the wrongdoer to the end that he will be induced to abide by an award; it will free the party wronged from the burden of costs of litigation to the end that valid arbitration awards will not be abandoned because of financial considerations; it will eliminate the need for strike as an alternate for tedious, protracted and expensive court enforcement of the arbitrator's award to the end that this potential source of industrial unrest will be eliminated; it will contribute to the elimination of the employer's use of its refusal to comply with an arbitrator's award as a subtle device for the purpose of undermining the union and minimizing its effectiveness as a bargaining agent to the end that the arbitration agreement may retain vitality as an instrument of industrial peace and the union shall not become the object of the employer's harassment; and, finally, the mandatory and unconditional award of attorney fees shall advance the objectives and purposes of the Labor Management Relations Act to secure peace and quietude in the relations between management and labor and shall be conducive to

bringing about an end to controversy between management and labor at the arbitral level.

We have come here because we earnestly believe that unless as a matter of right successful plaintiffs are awarded their attorney fees in actions for the specific enforcement of an arbitrator's award under Sec. 301 of the Act, the federal courts will be used ultimately to hamstring and perhaps even destroy the institution of arbitration. Moreover, there is a strong probability that arbitration as an institution may be priced out of existence. Nor will a free ride through the courts at the union's expense under any concept be conducive to industrial peace. We have demonstrated on the basis of reason and authority and statutory compulsion that sound public policy dictates that in the fashioning of the substantive law to be applied to cases arising under Sec. 301 of the Act for the specific enforcement of an arbitrator's award, this court should declare that an award of attorney fees to a successful plaintiff must be mandatory and unconditional.

Wherefore, we respectfully pray that this court for the reasons herein stated grant our petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8411

LOCAL No. 149 INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-AFL-CIO), WINCHESTER, VIRGINIA, *Appellant*,

versus

AMERICAN BRAKE SHOE COMPANY, WINCHESTER, VIRGINIA, PLANT OF AMERICAN BRAKEBLOCK DIVISION, WINCHESTER, VIRGINIA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT HARRISONBURG, JOHN PAUL, DISTRICT JUDGE.

(Argued October 23, 1961. Decided January 5, 1962.)

Before BOREMAN and BELL, *Circuit Judges*, and MARTIN, *District Judge*.

LOWELL GOERLICH (J. LYNN LUCAS AND HAROLD A. CRANEFIELD on Brief) for Appellant, and FLOURNEY L. LARGENT, JR., (LARGENT, ANDERSON AND LARRICK on Brief) for Appellee.

MARTIN, *District Judge*:

Appellant, Union, appeals from an order of the District Court refusing to award attorneys' fees to the Union. The Union was the prevailing party in this Court on the merits of a prior appeal. Upon remand to the District Court to effectuate the decision here reached, that court held "it should not be within the power of the courts to penalize litigants because their defenses cannot be upheld," and refused to award attorneys' fees as costs.

The original dispute in this case arose as the aftermath

of an arbitrator's award in favor of the Union. The arbitrator required reclassification of four individual employees who, the Union contended, were misclassified. Appellee, Employer, refused to reclassify these employees, contending that the award exceeded the arbitrator's authority under the contract and the submission. The District Court required specific enforcement of the award. This Court affirmed the findings of the District Court including its finding that it had jurisdiction (reported 285 F.2d 869).

Here the Union seeks to recover reasonable attorneys' fees as costs on the grounds that the employer's refusal to abide by the arbitrator's award was arbitrary and without any meritorious basis.

The propriety of awarding attorneys' fees against a party who, without justification, refuses to abide by an arbitrator's award and thereby necessitates enforcement proceedings in the District Court by virtue of § 301(a) of the Labor Management Relations Act (U.S.C. Title 29 § 185 (a)) is the sole issue in this case. This issue turns on the historical equity powers of federal courts since no statute authorizes attorneys' fees in these circumstances.

In *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.ed 1184 (1939), the question of "the power of federal courts in equity suits to allow counsel fees" was fully explored. Citing English and American precedent, the Court stated at pages 164, 165:

> "Allowances of such costs in appropriate situations is part of the equity jurisdiction of the federal courts. The suits 'in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery,' subject, of course, to modifications by Congress, e.g. Michaelson v. United States, 266 U.S. 42, 69 L.ed 162, 45 S.Ct. 18, 35 A.L.R. 454. The sources bearing an eighteenth century English practice — reports and manuals — uniformly support the power not only to give a fixed allowance for the various

steps in a su..., what are known as costs 'between party and party,' but also as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit, technically known as costs 'as between solicitor and client.'" (footnotes omitted)

Refusing to recognize any formula for the exercise of this power, the Court at page 167 stated:

> "As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility."
>
> . . . . . .
>
> "In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice."

The rationale of this decision has found application in a variety of situations in subsequent cases. The principle that the federal courts have inherent power to award attorneys' fees as costs in the absence of statutory authority has been recognized where such fees were denied,[1] relied on where they were granted.[2] The variety of factual circumstances in which this principle has been applied indicates that "dominating reasons of justice" has been the guide to its application.

[1] *Universal Oil Co., v. Root Ref. Co.*, 328 U. S. 575, 580, 66 S.Ct. 1176, 90 L.ed 1453 (1946); *Gordon v. Woods*, 202 F.2d 476 (1 Cir. 1953), rehearing denied, 203 F.2d 363; *Carlisle, Brown & Carlisle v. Carolina Scenic Stages*, 242 F.2d 259 (4 Cir. 1957); *Brisachye v. Tracy Collins Trust Company*, 277 F.2d 519 (10 Cir. 1960).

[2] *In re Swartz*, 130 F.2d 229 (7 Cir. 1942); *O'Hara v. Oakland County*, 136 F.2d 152 (6 Cir. 1943); *United States v. Anglin & Stevenson*, 145 F.2d 622 (10 Cir. 1944) Cert. den. 324 U.S. 844, 65 S.Ct. 678, 89 L.ed. 1405; *W. F. & John Barnes Co. v. International Harvester Co.*, 145 F.2d 915 (7 Cir. 1945); Cert. den. 324 U.S. 850, 65 S.Ct. 684, 89 L.ed 1410; *Welch v. National Savings & Trust Company*, 247 F.2d 781 (D.C. Cir. 1957), rehearing denied in Banc 1957; *Cleveland v. Second Nat. Bank & Trust Co.*, 149 F.2d 466 (6 Cir. 1945) Cert. den. 326 U.S. 775, 66 S.Ct. 228, 90 L.ed 468.

Guardian Trust Co. v. K. C. Southern Ry. Co., 28 F.2d 233 (8 Cir. 1928), is a treatise on the history of this subject in equity courts.

> "The power of courts of equity over costs does not rest upon the statutes, but upon usage long continued . . . costs as between solicitor and client (are allowed) where the litigation is false, unjust, vexatious, wanton, or oppressive.' *Bachhalter v. Rudé*, 54 F.2d 834 (10 Cir. 1931), reversed for misapplication of the principle 286 U.S. 451, 52 S.Ct. 605, 76 L.Ed. 1221 (1932)."

Unnecessary, groundless, vexatious and oppressive petitions and motions have been held to constitute appropriate reason for the exercise of the equitable power to award attorneys' fees against the offending party: *In re Swartz*, 130 F.2d 229 (7 Cir. 1942), rehearing denied.

This Court stated the general rule in equity in *Specialty Equipment & Mach. Corp. v. Tell Motor Car Co.*, 193 F.2d 515 (4 Cir. 1952) at pages 520, 521:

> ". . . which is that costs beyond those allowed by statute will be taxed only in exceptional circumstances, 'such as exist in the case of fraud, oppression, or bad faith cases of fiduciary relationship or those in which the prevailing party has helped to create the fund upon which the costs are charged.' *Swan Carburetor Co. v. Chrysler Corporation*, 6 Cir., 149 F.2d 476, 478; *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.ed 1184."

In actions for unfair competition attorneys' fees are assessed as an element of damages where the wrongdoers' action is unconscionable, fraudulent, willful, in bad faith, vexatious or exceptional.[3]

[3] *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538 (2 Cir. 1956); *National Van Lines v. Dean*, 237 F.2d 688 (9 Cir. 1956); *Hadelen Mfg. Co. v. Manila Lumber Co. et Am. Am.*, 116 F.2d 708 (7 Cir. 1941), Cert. den. 296 U.S. 639, 56 S.Ct. 174, 80 L.ed 454; *Admiral Corp. v. Penco, Inc.*, 203 F.2d 517 (2 Cir. 1953); *Keller Products, Inc. v. Rubber Linings*

The power of a court of equity to allow the taxation of attorneys' fees as costs has been before this Court. In *Bolar v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4 Cir. 1951), this Court dealt with such a situation. There Chief Judge Parker held that, under the Railway Labor Act, Negro firemen were entitled to relief against the railroad and the Brotherhood of Locomotive Firemen and Enginemen from a discriminatory contract entered into between the union and the railroad.

In sanctioning the award of attorneys' fees to the Negro firemen the Court said at page 481:

> "... under the circumstances here we think that the allowance of attorneys' fees as a part of the costs is a matter resting in the sound discretion of the trial judge. Ordinarily, of course, attorneys' fees, except as fixed by statute, should not be taxed as a part of the costs recovered by the prevailing party, but in a suit in equity where the taxation of such costs is essential to the doing of justice, they may be allowed in exceptional cases. The justification here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization which was required, as bargaining agent, to protect their interest. The vindication of their rights necessarily involves greater expense in the employment of counsel to institute and carry on extended and important litigation than the amount involved to the individual plaintiffs would justify their paying. ..."

In *Local 205, United E., R. & M. Wkrs. v. General Electric Co.*, 172 F.Supp. 960 (D. Mass. 1959), the iden-

Corp., 213 F.2d 382, 47 A.L.R. 2d 1108 (7 Cir. 1954); *Century Distilling Co. v. Continental Distilling Corp.*, 250 F.2d 140 (3 Cir. 1953); Cert. den. 346 U.S. 900, 74 S.Ct. 226, 98 L.ed 400. *Singer Mfg. Co. v. Redlich*, 109 F.Supp. 623 (S.D. Cal. 1952); *Louisiana Company v. B. H. Macy & Co.*, 153 F.Supp 87 (S.D. Ga. 1957); *Wolfe v. National Lead Company*, 156 F.Supp. 893 (S.D. Cal. 1957); aff. 272 F.2d 867 (9 Cir. 1959); *Taussig v. Wellington Fund, Inc.*, 187 F.Supp. 179 (D. Del. 1960); *Singer Mfg. Co. v. Singer Upholstering & Sewing Co.*, 130 F.Supp. 205 (W.D. Penn. 1955).

tical point here in issue was raised. The Court commented at page 961:

> "If a union in such a proceeding should ever be entitled to the extraordinary relief (I use the adjective in the legal sense) of costs taxed as between solicitor and client, a question on which I do not presently rule, I believe it should be only in a clear case of improper resistance to its rights. Cf. 35 U.S.C.A. § 285, and cases thereunder. This is not such a case."

Aside from the inherent power of courts of equity to award counsel fees in appropriate cases a directive policy has been declared by the Courts in interpretation of the Labor Management Relations Act.

Textile Workers v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.ed 2d 972, (1957), bears both on the question of the power of federal courts and its proper exercise under the Act. This case is a mandate to the lower courts to fashion a body of federal law to effectuate the policy of the National Labor Laws and an explanation of that policy. At page 457:

> "The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem."

See Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.ed 2d 1409 (1960) as to the policy of the Act.

From the authority herein cited it is clear that the District Court had the power to award attorneys' fees to Appellant, Union. This appears both from the Labor Relations Management Act, the constructions of that Act and the traditional practice of courts of equity.

The question remains as to how this traditional equitable power should be used to effectuate the policy of the Act under the mandate of the Supreme Court. The answer to this question will depend upon the particular facts of the case presented in light of the policy of the Act. In an appropriate case attorneys' fees should be awarded against a party who, without justification, refuses to abide by the award of an arbitrator.

This case having been before this Court on its merits in the original appeal, we do not find it falls within the category of those exceptional cases where such costs should have been allowed by the District Court.

The District Court's opinion enforcing the arbitrator's award was filed on January 8, 1960. In that opinion the District Court noted that the defendant (American Brake Shoe Company) relied on *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U.S. 437, 75 S.Ct. 489, 99 L.ed. 510 (1955) for its contention that the Court was without jurisdiction. The District Court rejected this contention in reliance on *Textile Workers Union of America* v. *Cone Mills Corporation*, 268 F.2d 920 (4 Cir. 1959) and cited *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, (363 U.S. 593, 80 S.Ct. 1358, 4 L.ed 2d 1424) before same was decided by the Supreme Court on June 20, 1960.

On appeal to this Court, 285 F.2d 869 (1961) in answering the same contention, this Court said at page 874:

> "Even since Textile Workers Union, etc. v. Lincoln Mills of Alabama, 1957, 353 U.S. 448, 77 S.Ct. 912, 923, 1 L.ed. 2d 972 there seems to have been a lingering doubt that the Westinghouse decision should be limited to its peculiar factual situation. This lingering doubt led the Court of Appeals for the Fifth Circuit, in Mississippi Valley Electric Company v. Local 130 of International Brotherhood of Electrical Workers, 1960, 278 F.2d 764, to hold that Section 301 of the Labor Management Relations Act did not confer upon the Federal Courts jurisdiction to enforce an arbitration award in a labor dispute where the award ordered

back pay. The doubt has been removed by the holding of the Supreme Court in United Steelworkers of America v. Enterprise Wheel & Car Corp., supra."

In view of the lingering doubt concerning the Westinghouse case there was justification for the litigation here involved.

Affirmed.

APPENDIX B

Memorandum by the Court on a Motion by the Plaintiff for an Award of Attorneys' Fee

In this case the plaintiff labor union brought suit to require the defendant to abide by an award made by an arbitrator to whom there had been referred a controversy arising out of the contract between the defendant, as employer, and the plaintiff, as bargaining agent of defendant's employees.

This court entered its order confirming the arbitrator's award and entered judgment thereon. Upon appeal the action of this court was, in substance, affirmed.

The plaintiff has now filed its motion asking the court to award a reasonable attorney's fee for plaintiff's counsel, to be adjudged against and paid by the defendant. The plaintiff, conceding that there is no statutory authority under which this court could act in granting such a motion, bases its request on the contention that the defendant's refusal to abide by the arbitration award was arbitrary and without any meritorious basis. It is urged that since the defendant agreed to the arbitration and thereafter without reason refused to abide by the results and compelled the plaintiff to resort to this court for justification of its rights, the court should exercise its equitable powers by adjudging a reasonable attorneys' fee in favor of the plaintiff.

This is the first time in the course of this case that this question has been raised and I think the motion of the plaintiff must be denied. While it appears from the record, at least to this court, that the defendant had no sound reasons for not complying voluntarily with the arbitrator's award, the court cannot say that its refusal to do so was not based on a belief that it was justified in refusing. In its answer to the complaint the defendant offered a number of defenses. And while these need not be enumerated here, the court cannot say that they were not offered in good faith, however unsound they may have turned out to be. Many litigants offer contentions of various sorts which

the courts find to have no legal foundation, but it should not be within the power of the courts to penalize litigants because their defenses cannot be upheld. It would be a dangerous custom to adopt for a court to punish defendants by compelling them to pay the attorneys' fees of the opposing parties whenever the defenses offered were found to be without merit.

The motion of the plaintiff is denied.

——— ———,

District Judge.

APPENDIX C

Application for Plaintiff's Attorney Fees

Now comes the plaintiff herein and makes application to the Court for the award of reasonable attorney fees for plaintiff's counsel in these proceedings.

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